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No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The petitioner's reply memorandum appears to misconceive the Government's position. It was, and is, our position that, under the scheme of insurance company taxation in issue, any administrative treatment (with the exception of the two isolated instances in 1921 and 1922) of prepayment fees as income "from other sources" has been through inaction rather than affirmative construction. Article 671 of Treasury Regulations 62, and its successors, by reference to the insurance forms for financial statements, excluded the items dealing with income from other sources, but it did not indicate whether the income resulting from fees for pre-

Appendix A

Income page of the Annual Statement for Life Companies (Edition of 1920) adopted by National Convention of Insurance Commissioners

I—CAPITAL STOCK

1. Amount of capital paid up, ... $.....
2. Amount of ledger assets (as per balance) December 31 *of previous year*, ... $.....
3. ...crease of capital during the year, ...
4. Extended at ..... $.....

II—INCOME

5. First year's premiums on original policies, without deduction for commissions or other expenses, less $..... for first year's reinsurance, ...
6. (a) First year's premiums for Total and Permanent Disability Benefits, less $..... for first year's reinsurance, ...
   (b) For additional Accidental Death Benefits included in life policies, less $..... for first year's reinsurance, ...
7. Surrender values applied to pay first year's premiums, ...
8. First year's premiums on original policies ..... $.....
9. Dividends applied to purchase paid-up additions and annuities, ...
10. Surrender values applied to purchase paid-up insurance and annuities, ...
11. Consideration for original annuities involving life contingencies, ...
12. New premiums, ... $.....
13. Renewal premiums (in addition to items 15, 17 and 18), without deduction for commissions or other expenses, less $..... for reinsurance on renewals, ...
14. (a) Renewal premiums for Total and Permanent Disability Benefits, less $..... for reinsurance on renewals, ...
    (b) For additional Accidental Death Benefits included in life policies, less $..... for reinsurance on renewals, ...
15. Dividends applied to pay renewal premiums, ...
16. Dividends applied to shorten the endowment or premium paying period, ...
17. Surrender values applied to pay renewal premiums, ...
18. Renewal premiums for deferred annuities, ...
19. Renewal premiums, ...
20. Premium income, ...
20A. Premiums reported during year, on U. S. monthly difference lists, to War Risk Insurance Bureau in accordance with the Soldiers' and Sailors' Civil Relief Act, ...
20B. Total, items 5-20A inclusive, ...
21. Consideration for supplementary contracts involving life contingencies, ...
22. (A) Consideration for supplementary contracts *not* involving life contingencies, ...
23. Dividends left with the company to accumulate at interest, ...
24. Ledger assets, other than premiums, received from other companies for assuming their risks .....
25. Gross interest on mortgage loans, less $..... accrued interest on mortgages acquired during 1920. $.....
26. Gross interest on collateral loans, per Schedule C .....
27. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 1920, per Schedule D, ...
28. Gross interest on premium notes, policy loans or liens, including $..... interest received on bonds deposited with the company under the Soldiers' and Sailors' Civil Relief Act, ...
29. Gross interest on deposits in trust companies and banks per Schedule E, ...
31. .....

Appendix B

Income page of Annual Statement for Life Companies (Convention Edition), page 24, Bulletin "H", April 9, 1921

I.—CAPITAL STOCK

1. Amount of capital paid up in cash, ... $.....
2. Amount of ledger assets (as per balance) December 31 *of previous year*, ... $.....
3. ...crease of capital during the year, ...
4. EXTENDED AT ..... $.....

II.—INCOME

5. First year's premiums on original policies, without deduction for commissions or other expenses, less $..... for first year's reinsurance, ... $.....
6. Surrender values applied to pay first year's premiums, ...
7. Total first year's premiums on original policies, .. $.....
8. Dividends applied to purchase paid-up additions and annuities, ...
9. Surrender values applied to purchase paid up insurance and annuities, ...
10. Consideration for original annuities involving life contingencies, ...
11. Consideration for supplementary contracts involving life contingencies, ...
12. Total new premiums, ... $.....
13. Renewal premiums (in addition to items 14, 16, and 17), without deduction for commissions or other expenses, less $..... for reinsurance on renewals, ... $.....
14. Dividends applied to pay renewal premiums, ...
15. Dividends applied to shorten the endowment or premium-paying period, ...
16. Surrender values applied to pay renewal premiums, ...
17. Renewal premiums for deferred annuities, ...
18. Total renewal premiums, ...
19. Extra premiums for total and permanent disability benefits $..... and for additional accidental death benefits $..... included in life policies, ...
20. Total premium income, ... $.....
21. (a) Consideration for supplementary contracts *not* involving life contingencies, ...
22. Dividends left with the company to accumulate at interest, ...
23. Ledger assets, other than premiums, received from other companies for assuming their risks, ...
24. Gross interest on mortgage loans, per Schedule B, less $..... accrued interest on mortgages acquired during 19..... $.....
25. Gross interest on collateral loans, per Schedule C, ...
26. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 19....., per Schedule D, ...
27. Gross interest on premium notes, policy loans or liens, ...
28. Gross interest on deposits in trust companies and banks, per Schedule E, ...
29. Gross interest on other debts due the company (give items and amounts), ...
30. .....
31. .....
32. Gross discount on claims paid in advance, ...
33. Gross rent from company's property, including $..... for company's occupancy of its own buildings, per Schedule A, ...
34. Total gross interest and rents, ...
35. From other sources (give items and amounts): $.....
36. .....
37. .....

payments fell in that category or in the item dealing with interest, which is the issue now being raised.

In order to show an affirmative administrative construction supporting its position, the petitioner referred to Bulletin H, which did treat prepayment charges as income from other sources. The brief in opposition merely pointed out that Bulletin H had reference to a prior statute (which, we note, did not distinguish between interest and income from other sources) and identified the items of insurance company income by reference to a different list from that incorporated in the Treasury Regulations. The point was, and is, that the Treasury Regulations cited made no reference to Bulletin H and that there is no basis for arguing that they adopted the interpretation contained therein which was made without reference to the issue on taxability involved in those Regulations and in this case. In short, as Mr. Justice Reed's opinion for the Court of Claims concluded (Pet. 6a), there is "no positive evidence * * * that any failure to assert a claim to these taxes was the result of a conscious decision on the part of the Commissioner."

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER, 1960.

20B. Total, items 5-20A inclusive, ...

21. Consideration for supplementary contracts involving life contingencies, ...

22. (A) Consideration for supplementary contracts *not* involving life contingencies, ...

23. Dividends left with the company to accumulate at interest, ...

24. Ledger assets, other than premiums, received from other companies for assuming their risks .....

25. Gross interest on mortgage loans, less $..... accrued interest on mortgages acquired during 1920.. $.....

26. Gross interest on collateral loans, per Schedule C.....

27. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 1920, per Schedule D, ...

28. Gross interest on premium notes, policy loans or liens, including $..... interest received on bonds deposited with the company under the Soldiers' and Sailors' Civil Relief Act, ...

29. Gross interest on deposits in trust companies and banks, per Schedule E, ...

31. .....

32. .....

33. Gross discount on claims paid in advance, ...

34. Gross rent from company's property, including $..... for company's occupancy of its own buildings, less $..... interest on incumbrances per Schedule A, ...

35. Total interest and rents, ...

36. From other sources (give items and amounts):

37. ..... $.....

38. .....

39. .....

40. .....

41. From agents' balances previously charged off, ...

42. Borrowed money (gross) .....

43. Gross profit on sale or maturity of ledger assets, viz.:
(a) Real estate, per Schedule A, ... $.....
(b) Bonds, per Schedule D, ...
(c) Stocks, per Schedule D, ...

44. Gross increase, by adjustment, in book value of ledger assets, viz.:
(a) Real estate, per Schedule A, ... $.....
(b) Bonds, per Schedule D, (including $..... for accrual of discount), ...
(c) Stocks, per Schedule D. ....

45. Total Income, ... $

46. Amount carried forward, ... $

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

* Company is at liberty to briefly state transaction, so that explanation can be carried as footnote in department report.

(Emphasis indicated by bracket and arrow supplied.)

during 19..... $.....

25. Gross interest on collateral loans, per Schedule C, ...
26. Gross interest on bonds and dividends on stocks, less $..... accrued interest on bonds acquired during 19...., per Schedule D, ...
27. Gross interest on premium notes, policy loans or liens, ..
28. Gross interest on deposits in trust companies and banks, per Schedule E, ...
29. Gross interest on other debts due the company (give items and amounts), ...
30. .....
31. .....
32. Gross discount on claims paid in advance, ...
33. Gross rent from company's property, including $..... for company's occupancy of its own buildings, per Schedule A, ...

34. Total gross interest and rents, ...
35. From other sources (give items and amounts): $.....
36. .....
37. .....
38.
40. From agents' balances previously charged off, ...
41. Borrowed money (gross).* .....
42. Gross profit on sale or maturity of ledger assets, viz.: $.....
    (a) Real estate, per Schedule A, ...
    (b) Bonds, per Schedule D, ...
    (c) Stocks, per Schedule D, ...

43. Gross increase, by adjustment, in book value of ledger assets, viz.: $.....
    (a) Real estate, per Schedule A, ...
    (b) Bonds, per Schedule D (including $..... for accrual of discount), ...
    (c) Stocks, per Schedule D, ...

44. TOTAL INCOME ..... $.....
45. Amount carried forward. ..... $.....

(a) Including commuted value of installments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of disbursements.
* Company is at liberty to briefly state transaction, so that explanation can be carried as footnote in department report.

(Emphasis indicated by bracket and arrow supplied.)